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Supreme Court, U.S.
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No. 02-707

In The
Supreme Court of the United States

DISABLED RIGHTS ACTION COMMITTEE,

Petitioner,

v.

ARCHON CORPORATION, formerly
SANTA FE GAMING CORPORATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals, in affirming the district court's dismissal of Petitioner's action, addressed the federal question presented to it by Petitioner: Whether monetary damages are available under the private enforcement provision of Title III of the Americans With Disabilities Act, 42 U.S.C. § 12188(a)(1) (incorporating 42 U.S.C. § 2000a-3(a) as its remedial provision).

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

Petitioner is the Disabled Rights Action Committee ("Disabled Rights"), a Utah nonprofit corporation. Disabled Rights was one of two plaintiffs in the district court, and one of two appellants in the Ninth Circuit Court of Appeals. The other plaintiff in the district court, as well as an appellant in the Ninth Circuit, was Ronald Ray Smith, an individual member of Disabled Rights. Mr. Smith is not a party to the proceeding now before this Court, as Mr. Smith died subsequent to the proceedings before the Ninth Circuit, but prior to Disabled Rights' Petition being filed with this Court.

Respondent is Archon Corporation, a publicly-traded Nevada corporation. Archon Corporation was formerly known as Santa Fe Gaming Corporation and, as Santa Fe Gaming Corporation, was the defendant in the district court and the appellee in the Ninth Circuit.

Respondent Archon Corporation has no parent corporation, and there are no publicly-traded corporations that own ten percent (10%) or more of the corporation's stock.

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OPINIONS BELOW

The unpublished decision of the district court is not reported, but is reprinted in the Petitioner's Appendix ("Pet. App.") at 4a. The unpublished decision of the court of appeals is likewise not reported, but is reprinted at Pet. App. at 1a.

JURISDICTION

The court of appeals entered judgment on March 20, 2002. Pet. App. at 1a. Petitioner timely filed with the court of appeals a "Petition for Rehearing and Petition for Rehearing En Banc." Petition ("Pet.") at 6. The court of appeals entered its order denying the petition on August 8, 2002. Pet. App. at 8a. Petitioner timely filed its Petition for Writ of Certiorari with this Court on November 6, 2002.

This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Although Petitioner claims that the provision at issue is 28 U.S.C. § 1291, an act entitled "Final Decisions of the District Courts," and stating that "[t]he court of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States," it is Title III of the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et seq.*, and the private enforcement provision incorporated into Title III of the ADA, 42 U.S.C. § 2000a-3(a), that is at issue.

STATEMENT OF THE CASE

On June 19, 2000, Disabled Rights and Ronald Ray Smith filed a Complaint against Santa Fe Gaming Corporation ("Santa Fe"), which is now known as Archon Corporation. Pet. App. at 10a. Disabled Rights and Mr. Smith claimed that Santa Fe operated a shuttle bus that was not wheelchair-accessible, in violation of Title III of the ADA, 42 U.S.C. § 12101, *et seq.* Pet. App. at 12a-13a.

Based on this allegation, Disabled Rights and Mr. Smith forwarded two causes of action in their Complaint, the first entitled "Violation of ADA," and the second entitled "Accounting for Unjust Enrichment." *Id.* at 13a-14a. In regard to the remedies sought, Disabled Rights and Mr. Smith requested "a permanent injunction enjoining Defendants, their agents, employees and assigns from discrimination on the basis of disability in violation of the [ADA]." *Id.* Additionally, Disabled Rights and Mr. Smith asked for monetary relief, in that "Defendants have been unjustly enriched, and the full application of principles of equity requires Defendants to disgorge to Plaintiffs the full amount of economic gain reaped by Defendants through Defendants' illegal conduct." *Id.* at 14a.

All parties concede that the request for injunctive relief became moot during the proceedings before the district court when the bus in question was sold as part of an asset sale on October 2, 2000. Pet. at 4, n.4. As such, the district court dismissed the claim for injunctive relief pursuant to Federal Rule of Civil Procedure 41(a)(2). *Id.* Accordingly, the only requested remedy that remained was Disabled Rights' and Mr. Smith's request that "Defendants . . . disgorge to Plaintiff the full amount of economic gain

reaped by Defendants through Defendants' illegal conduct." *Id.* at 14a.

As to the "disgorgement" issue, Santa Fe filed a motion to dismiss with the district court pursuant to Federal Rule of Civil Procedure 12(b)(6). Pet. App. at 5a. Santa Fe asserted that Disabled Rights and Mr. Smith had failed to state a claim upon which relief could be granted. Specifically, Santa Fe's motion was based upon the argument that Title III of the ADA, and the enforcement provision of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a), which is incorporated into Title III of the ADA, monetary relief – whether denominated an "accounting for unjust enrichment" or "disgorgement" of monies – is not permitted. *Id.* Instead, only injunctive relief is available as a remedy for alleged violations of Title III of the ADA. *Id.* The district court granted Santa Fe's motion and, because the injunctive relief claim had already been disposed of, dismissed the entire action. *Id.*

Disabled Rights and Mr. Smith appealed the district court's decision to the Ninth Circuit Court of Appeals. *Id.* at 1a-3a. Their sole contention on appeal was that monetary relief – in the form of some sort of accounting or disgorgement – should be allowed under Title III of the ADA. *Id.* No other arguments were presented to the Ninth Circuit. *Id.* The Ninth Circuit, following the clear statutory mandate of Title III of the ADA and well-established case law on the subject, determined that monetary relief is not available under Title III of the ADA, and properly affirmed the district court's decision. *Id.*

After the Ninth Circuit affirmed the district court's decision, but prior to Disabled Rights' Petition for Writ of

Certiorari being filed, Mr. Smith died. Pet. at ii. Disabled Rights' Petition followed.

REASONS FOR DENYING THE PETITION

I. PETITIONER DISABLED RIGHTS DOES NOT HAVE STANDING AND, AS SUCH, THE ISSUE PRESENTED TO THIS COURT IS NOW MOOT

Two parties filed suit as plaintiffs in the district court: Mr. Smith and Disabled Rights. Pet. at 10a. Following the proceedings before the Ninth Circuit, but prior to the filing of the Petition with this Court, Mr. Smith died. Pet. at ii. Thus, the only Petitioner in this matter is Disabled Rights. *Id.* Because Disabled Rights does not have standing, this matter is moot.

It its Petition and Complaint, Disabled Rights alleges that it is "a Utah nonprofit corporation having members residing in Las Vegas, Nevada." *Id.* at ii; Pet. App. at 11a. According to the Complaint, Disabled Rights is "organized with the principal purpose of helping to eliminate discrimination against individuals with disabilities by ensuring compliance with laws intended to provide access to housing, public buildings, transportation, goods and services." Pet. App. at 11a.

To have standing under Title III of the ADA, Disabled Rights must establish that it has associational or representational standing under the test set forth in this Court's decision in *Hunt v. Washington State Apple Advertising Comm.*, 432 U.S. 333, 343 (1977): "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in

their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of an individual member in the lawsuit." *Id.*

Federal courts have routinely held that, in regard to Title III of the ADA, organizations cannot meet the third prong of the *Hunt* test for two reasons. *See Association For Disabled Americans, Inc. v. Concourde Gaming Corp.*, 158 F.Supp.2d 1353, 1363-64 (S.D.Fla. 2001); *Concerned Parents To Save Dreher Park Center v. City of West Palm Beach*, 884 F.Supp. 487, 488-89 (S.D.Fla. 1994); *see also Kessler Institute for Rehabilitation, Inc. v. Mayor and Council of Borough of Essex Falls*, 876 F.Supp. 641 (D.N.J. 1995). First, any finding of an ADA violation requires proof as to each individual claimant, which an organization cannot show. *See Concerned Parents To Save Dreher Park Center*, 884 F.Supp. at 488-89. Second, the relief accorded to each claimant under the ADA requires "an individualized assessment" of what measures the respondent must take in order to comply with the ADA. *Id.* This requirement, in turn, must be measured on a "case-by-case basis" as it relates to each claimant that, again, an organization cannot demonstrate. *Id.*

A case in point is *Concerned Parents To Save Dreher Park Center v. City of West Palm Beach*, 884 F.Supp. 487, 488-89 (S.D.Fla. 1994). In that case, Concerned Parents, an "organization of over fifty parents and volunteers organized to protect the rights of people with disabilities to recreational opportunities in the City of West Palm Beach," sued a municipality under Title III of the ADA. *Id.* at 488. The district court granted the municipality's motion to dismiss Concerned Parents as a named plaintiff because, as an organization, Concerned Parents could not

meet the third part of the *Hunt* test. *Id.* at 489. Just like Concerned Parents, Disabled Rights is "organized with the principal purpose of helping to eliminate discrimination against individuals with disabilities by ensuring compliance with laws intended to provide access to housing, public buildings, transportation, goods and services." Pet. at 11a.

As is evident, Disabled Rights does not have standing, now that Mr. Smith is deceased, to pursue the ADA claim. The requirement of standing applies to all stages of federal court proceedings, including both trial and appellate levels. In other words, if the requirements of standing are abrogated at some point in the proceeding, the dispute is moot. *See United States Parole Commn. v. Geraghty*, 445 U.S. 388, 397 (1980) ("One commentator has defined mootness as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness).'"). Because Disabled Rights lacks standing, this issue is now moot, and its Petition should be denied. *See Dove v. United States*, 423 U.S. 325 (1976) (denial of petition for certiorari because criminal defendant died during pendency of appeal).

II. PETITIONER DISABLED RIGHTS' CLAIM THAT THE NINTH CIRCUIT FAILED TO ADDRESS THE QUESTION OF WHAT REMEDIES ARE AVAILABLE UNDER TITLE III OF THE ADA IS WITHOUT MERIT

The primary argument presented in Disabled Rights' Petition is that this Court should grant its Petition because the Ninth Circuit, according to Disabled Rights, failed to address and ignored the issue of what remedies

are available under Title III of the ADA. *See* Pet. at i; 6. Specifically, Disabled Rights asserts that it sought to have the Ninth Circuit answer the question of whether "disgorgement" is an available remedy under Title III of the ADA. *Id.* According to Disabled Rights, the Ninth Circuit failed to address or answer this question; rather, it addressed only whether Disabled Rights' Complaint made out a valid *state law* claim of unjust enrichment. *Id.* This Court, however, need look no further than the question presented in Disabled Rights' Petition and the Ninth Circuit's decision to conclude that this argument is without merit, and that Disabled Rights' Petition should be denied.

As the issue is framed by Disabled Rights, it asks this Court "whether a Court of Appeals may affirm the dismissal of the case by *ignoring the federal issue presented for review* and, accordingly, by ignoring that court's duty to hear and decide the case." Pet. at i (emphasis added). In short, Disabled Rights argues that its Petition should be granted because, essentially, the Ninth Circuit decided the case based on the state law unjust enrichment claim, as opposed to determining, as Disabled Rights argues it asked the Ninth Circuit to decide, whether "disgorgement" is a remedy for a violation of Title III of the ADA. *Id.* at 6 ("The Ninth Circuit's decision [affirming the district court's dismissal of the matter] is based on a reading of the Complaint as making out a claim of 'unjust enrichment' under state law. What was intended by [Disabled Rights] (and what was *understood* by the litigants and the District Court) was that [Disabled Rights] was seeking disgorgement as a remedy for violation of Title III of the ADA.") (emphasis in original). In other words, Disabled Rights argues that the Ninth Circuit decided the case with

reference to the state law claim of unjust enrichment, instead of deciding whether "disgorgement" is a remedy for the federal claim brought under Title III of the ADA.

A plain reading of *both* the district court's decision and the Ninth Circuit's opinion establishes that Disabled Rights is simply wrong. The district court and the Ninth Circuit indisputably addressed and decided the very issue that Disabled Rights now complains was not considered below. As such, Disabled Rights' Petition should be denied.

In its decision, the district court stated that Disabled Rights Complaint sought "an accounting for unjust enrichment, which includes the 'application of the principles of equity [requiring] Defendants to disgorge to Plaintiffs the full amount of economic gain reaped by Defendants through their illegal conduct.'" Pet. App. at 6a (bracketed material in original). The district court noted that although Disabled Rights termed its request as an "accounting for profits," the remedy sought was the "disgorgement" of profits. *Id.* Holding that such a "disgorgement" is a form of monetary relief that is unavailable under Title III of the ADA, the district court granted Santa Fe's motion to dismiss. Pet. App. at 7a. The district court therefore analyzed and decided whether "disgorgement" is an available remedy for the alleged violation of Title III of the ADA.

Likewise, the Ninth Circuit addressed whether disgorgement is an available remedy under Title III of the ADA. In its decision, the Ninth Circuit restated the gravamen of Disabled Rights' case as an "action pursuant to Title III of the Americans With Disabilities Act ("ADA"), seeking an accounting for unjust enrichment. . . . " Pet. App. at 2a. The Ninth Circuit further observed that "[t]he

district court ruled that the remedial provisions of Title III of the ADA, 42 U.S.C. § 12188, does not allow an equitable remedy in monetary form, such as an accounting for unjust enrichment." *Id.* Finally, in affirming the district court's dismissal, the Ninth Circuit held that "[d]amages are not an available remedy for a violation of Title III of the ADA." Pet. App. at 3a.

It is unclear how Disabled Rights perceives that either the district court or the Ninth Circuit failed to address the issue of what remedies are available under Title III of the ADA. Both courts decided that precise issue. Therefore, any claim by Disabled Rights that its Petition should be granted because the Ninth Circuit failed to address the federal issue presented to it is wholly without merit.

III. THERE IS NO MERIT TO PETITIONER DISABLED RIGHTS' UNDERLYING PREMISE THAT MONETARY RELIEF IS AVAILABLE UNDER TITLE III OF THE ADA

Underlying Disabled Rights' argument is the substantive question of what remedies are available under Title III of the ADA. This question was fully briefed to the Ninth Circuit, and by asking this Court to grant its Petition, this is the substantive question that Disabled Rights seeks to have this Court, or the Ninth Circuit on remand, address. By doing so, Disabled Rights seeks to have this Court depart from both the clear mandate of Title III of the ADA, as well as this Court's and every other circuit court of appeals' well-established precedent.

Disabled Rights based its Complaint on the private enforcement provision of Title III of the ADA, 42 U.S.C. § 12188(a)(1). *See* Pet. App. at 10a-11a. This provision,

entitled "Availability of Remedies and Procedures," does not set forth any specific relief one may seek in connection with an alleged violation of Title III of the ADA, but instead incorporates "the remedies and procedures set forth in sections 2000a-3(a)" of the Civil Rights Act of 1964, 42 U.S.C. § 2000a-3(a). This provision, which is entitled "Civil Actions for Injunctive Relief," in turn states that a party may seek "preventative relief, including an application for a permanent or temporary injunction, restraining order, or other order. . . . " 42 U.S.C. § 2000a-3(a).

Although Disabled Rights argued below that the language "preventative relief" and "other order[s]" entailed requests for an accounting, a disgorgement of monies, or claims of unjust enrichment, an unbroken line of authorities, including this Court's own pronouncement on this issue, makes clear that such is not the case. Simply put, injunctive relief, but not monetary relief, is available to private litigants under Title III of the ADA. *See Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968) (monetary damages are not available under the private enforcement provision of 42 U.S.C. § 2000a-3(a)); *Fischer v. SJB-P.D., Inc.*, 214 F.3d 1115, 1120 (9th Cir. 2000); *American Bus Assoc. v. Slater*, 231 F.3d 1 (D.C. Cir. 2000) (Congress unambiguously precluded monetary damages as a remedy under the private enforcement provision of Title III of the ADA, 42 U.S.C. § 12188(a)(1)); *Stan v. Wal-Mart Stores, Inc.*, 111 F.Supp.2d 119, 124 (N.D.N.Y. 2000) (under the plain language of Title III of the ADA and 42 U.S.C. § 2000a-3(a), monetary relief, including compensatory and punitive damages, is not available); *Long v. Coast Resorts, Inc.*, 32 F.Supp.2d 1203, 1209 (D.Nev. 1998) (monetary damages not recoverable under ADA); *Botosan v. Fitzhugh*,

13 F.Supp.2d 1047 (S.D.Cal. 1998) (compensatory damages not recoverable under ADA); *Boemio v. Love's Restaurant*, 954 F.Supp. 204, 207 (S.D.Cal. 1997) (compensatory damages not recoverable under ADA); *Independent Living Resources v. Oregon Arena Corp.*, 982 F.Supp. 698, 771 (D.Or. 1997) (in an action by a private party for violation of Title III of the ADA, the court may award only injunctive relief, not damages); *Lyle v. Villages of Golden Valley*, 310 F.Supp. 852, 854-55 (D.Minn. 1970) (monetary damages under 42 U.S.C. § 2000a-3 are prohibited, since the section is limited to injunctive relief). As the Ninth Circuit stated:

> One of the purposes of the ADA is to provide people with disabilities *access* to places of public accommodation. *See* 42 U.S.C. § 12182(a). In an effort to achieve this goal as quickly as possible, Congress created a cause of action for private individuals, but limited the remedies available under that cause of action to "preventative" or equitable relief. *See* 42 U.S.C. § 12188(a)(1). *Monetary relief is not an option for private individuals under Title III of the ADA. Id.* As a result, a plaintiff who files an ADA claim can at most hope to improve access through an injunction.

Fischer, 214 F.3d at 1120 (emphasis added).

Furthermore, monetary relief *is* available under Title III of the ADA. *See* 42 U.S.C. § 12188(b). This provision, however, allows enforcement of Title III of the ADA *only* by the Attorney General, not by private litigants such as Disabled Rights and Mr. Smith. Since Disabled Rights and Mr. Smith chose to bring the underlying suit in their capacity as private litigants, and did not seek to have the

Attorney General intervene, Disabled Rights is limited to the relief afforded by 42 U.S.C. § 12188(a)(1).

Not only has this Court spoken to this issue, *see Newman v. Piggie Park Enterprises*, 390 U.S. 400, 402 (1968), there is no conflict between the circuit courts of appeals. Thus, any argument forwarded by Disabled Rights that this Court should grant its Petition to answer this question is without merit. Simply put, this Court's own pronouncement on this issue is clear, there is no split of authority among the circuit courts of appeals, and the statutory language could not be clearer.

IV. SIMPLY BECAUSE THE NINTH CIRCUIT DECIDED THIS CASE IN AN UNPUBLISHED OPINION DOES NOT WARRANT GRANTING THE PETITION

As a final attempt to garner this Court's support for its Petition, Disabled Rights attempts to argue that the Ninth Circuit's disposition of this case through means of an unpublished decision somehow evidenced a failure by the Ninth Circuit to exercise its duty to hear and decide the case. Pet. at 17-22. In this regard, Disabled Rights argues that by affirming the district court's decision in an unpublished decision, the Ninth Circuit "effectively decided not to decide the case presented to it for review." *Id.* at 20.

Notwithstanding that there is absolutely no legal support for Disabled Rights' tenuous position, the fact that the Ninth Circuit reviewed the district court's decision in an unpublished decision has no bearing on whether Disabled Rights' Petition should be granted. Simply put, the fact that the Ninth Circuit disposed of this case in an

unpublished decision does not change the fact that the question presented in Disabled Rights' Petition does not warrant granting the Petition.

CONCLUSION

For all of the foregoing reasons, Respondent Archon Corporation respectfully requests that this Court deny Petitioner Disabled Rights Action Committee's Petition for Writ of Certiorari.

Respectfully submitted,

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